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Attorneys for Defendant
BIMBO BAKERIES USA, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALEX ANG and LYNN STREIT,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

BIMBO BAKERIES USA, INC.,

Defendant.

Case No. 13-CV-1196 (WHO) (NC)

**DEFENDANT'S MOTION FOR RELIEF
FROM NON-DISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGE;
DECLARATIONS OF ETHAN A. MILLER
AND GREGORY L. MORENO**

Judge: Hon. William H. Orrick

[Filed concurrently with: [Proposed] Order]

Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and Local Rule 72-2, Defendant Bimbo Bakeries USA, Inc. (“BBUSA”) submits this Objection to the deadline set by the Magistrate Judge to comply with the discovery order issued on May 14, 2014 (Dkt. 80) (the “Order”), and respectfully requests that this Court grant an appropriate extension.

I. INTRODUCTION

BBUSA is diligently attempting to comply with every aspect of the Magistrate Judge’s Order but simply needs more time to do so, for two reasons: Almost every request at issue is subject to e-discovery (which has just begun) and BBUSA must either generate or obtain from a third-party vendor the sales and pricing information that the plaintiffs seek.¹ There is no prejudice to the plaintiffs in a modest extension, particularly since just last month the plaintiffs obtained a six-month continuance of the trial in this action (now set for *November, 2015*).

E-discovery issues were not addressed in the briefing or oral argument before the Magistrate, because the parties were focused on the discoverability of the information, not the timing of the production. Indeed, at no point did the plaintiffs request any particular deadline, and certainly not a 14-day deadline, for the production of the information. Nevertheless, the Magistrate *sua sponte* set May 28, 2014 (just 14 days after the Order) as BBUSA’s deadline to produce all responsive documents. This deadline is impossible to meet. Now that the Magistrate has resolved the discovery disputes, the parties can move forward with e-discovery, but there is still much to be done, including finalizing the e-discovery protocol and search terms and engaging a vendor to apply the agreed search parameters to the computers of BBUSA’s numerous custodians and likely to its central servers and any back-up tapes. BBUSA then must review the data for responsiveness and privilege before processing and producing it. BBUSA will complete this process diligently and in strict compliance with the Order, but it needs substantially more than 14 days to do so, particularly as the requests require BBUSA to review records from an 8-year period.

¹ Indeed, BBUSA is attempting to comply with the non-e-discovery portions of the Order, including the production of pricing and sales information, by the deadline of today, but will not be able to gather the information in time. As of now, the information is both incomplete and over-inclusive.

1 In addition, most of the sales and pricing information sought by the plaintiffs is either
 2 (i) available to BBUSA but does not exist in a form that would be responsive to the requests; or
 3 (ii) not in BBUSA's possession, custody or control, and subject to a third-party vendor's ability to
 4 provide it (to the extent the information exists). BBUSA simply needs a short extension to enable
 5 it to obtain the information the plaintiffs seek.

6 As such, BBUSA requests an additional 21 days (to June 18, 2014) to produce documents
 7 responsive to the requests for sales and pricing information, and an additional 90 days to produce
 8 documents in response to all other requests that are subject to e-discovery.²

9 **II. BRIEF STATEMENT OF FACTS**

10 On January 24, 2014, the plaintiffs served BBUSA with a set of interrogatories and a set
 11 of document requests (together, the "Requests"). Declaration of Ethan A. Miller ("Miller Decl."),
 12 ¶ 2. BBUSA served its original objections and responses on March 7, 2014. *Id.* at ¶ 3.³
 13 BBUSA's main objections, which became the subject of a lengthy meet and confer process and
 14 motion practice before the Magistrate, were as follows: (1) pre-Class Period discovery is
 15 irrelevant and unduly burdensome; (2) the profit, sales and pricing information sought by the
 16 plaintiffs is irrelevant to their damages calculation (as this is not a disgorgement case) and is
 17 premature to the extent it is relevant for punitive damages; and (3) purchases of BBUSA products
 18 outside California by non-California residents are irrelevant because they have no connection to
 19 California and cannot be subject to California's consumer protection laws. *See* Dkt. 76. In the
 20 Order, the Magistrate ruled in favor of the plaintiffs on these issues. *See* Dkt. 80. Further, the
 21 Order directed BBUSA to serve supplemental responses to the Requests and produce all
 22 responsive documents by May 28, 2014. *See id.* The Order provides notice of BBUSA's right to
 23 object within 14 days, pursuant to Rule 72(a). *Id.*

24 **III. STANDARD OF REVIEW**

25 A court reviews a Magistrate Judge's order under the "clearly erroneous" or "contrary to
 26

27 ² BBUSA sought the plaintiffs' agreement to a 60-day extension of its compliance deadline, and the plaintiffs agreed
 28 to one week.

³ BBUSA supplemented its responses on May 14, 2014, but that supplementation is immaterial to this Motion.

law” standard. Fed. R. Civ. P. 72(a). The “clearly erroneous” standard requires that “factual findings and discretionary decisions” of a Magistrate Judge be overturned if the district court has a “definite and firm conviction” that a mistake has been made. *F.D.I.C. v. Fidelity & Deposit Co. or Maryland*, 196 F.R.D. 375, 378 (S.D. Cal. 2000). Since the compliance deadline is clearly not a legal determination subject to the “contrary to law” test, BBUSA discusses the deadline in the context of the “clearly erroneous” standard.

IV. THE 14-DAY DEADLINE FOR PRODUCING ALL RESPONSIVE DOCUMENTS IS CLEARLY ERRONEOUS

A. BBUSA Requests a 90-Day Extension to Complete E-Discovery

BBUSA objects to just one aspect of the Order – the 14-day deadline to produce all responsive documents. *See* Order, 4:12; 6:1-4; 7:26-8:1. The 14-day deadline is simply not workable. Most of the plaintiffs’ 75 document requests, which now cover an 8-year period, are subject to e-discovery pursuant to Rule 26(b).⁴ However, e-discovery issues were not addressed in the parties’ briefs or oral arguments before the Magistrate, because they were focused solely on the discoverability of the information. Miller Decl., ¶¶ 5-6. Nevertheless, the Magistrate imposed a 14-day deadline *sua sponte*.

It is impossible for BBUSA to comply with this deadline because the e-discovery process has just begun. *Id.* at ¶¶ 7-9. The subject of e-discovery was first raised by BBUSA during the meet and confer process approximately one month ago regarding the Requests, during which BBUSA offered to draft an e-discovery protocol and proposed search terms. *Id.* at ¶ 9. Of course, it made no sense to actually negotiate the search terms while the discovery disputes were pending before the Magistrate, and the plaintiffs did not pursue such negotiation and have expressed little or no urgency regarding e-discovery.⁵ *Id.* at ¶ 9. However, now that the Magistrate has ruled on the discovery disputes, the parties can finalize their e-discovery

⁴ Plaintiffs broadly seek, for example, “all documents relating to the labeling or packaging” of the products at issue (RFP No. 1), “all documents relating to food labeling requirements” that relate to the products at issue (RFP No. 5), and “all documents relating to the difference in pricing” between the products at issue and competing products (RFP No. 73). Miller Decl., ¶ 8. Even after this Court dismissed from the litigation certain categories of products, this case still involves no less than 34 products sold throughout the nation.

⁵ Thus, any argument that an extension is not warranted because BBUSA should have drafted the e-discovery protocol earlier ought to be rejected.

1 agreement. *Id.* at ¶ 10. BBUSA intends to offer its proposal in the next seven days.

2 Even after the agreement is finalized, BBUSA will likely need to engage a vendor to
 3 apply the agreement and search terms to BBUSA's electronic systems and perform quality control
 4 on the resulting data set – BBUSA has identified over a dozen custodians and various company
 5 servers, drives and data backup locations. *Id.* at ¶ 11. The data must then be processed into a
 6 form that can be reviewed by outside counsel. *Id.* at ¶ 12. Given the scope of the requests and
 7 the varied likely sources of responsive information, the initial gathering and processing of the
 8 data alone may take 6 to 8 weeks. *Id.* at ¶ 11. Thereafter, counsel's review of the documents for
 9 privilege and responsiveness is anticipated to take another 30 days. *Id.* at ¶ 12.

10 Based on the foregoing, the 14-day deadline imposed *sua sponte* by the Magistrate is
 11 unrealistic with respect to the Requests that are subject to e-discovery. BBUSA respectfully
 12 requests that the Court modify this portion of the Order, and extend the compliance deadline by
 13 90 days, to August 28, 2014. Such an extension will not prejudice the plaintiffs, who recently
 14 requested and obtained a 6-month continuance of the trial date to November 9, 2015.

15 **B. BBUSA Requests a 14-Day Extension to Obtain and Provide Sales,**
 16 **Pricing, and Profits Information**

17 With respect to several other Requests that seek sales and pricing information and will not
 18 be subject to the e-discovery protocol, BBUSA needs just a brief 21-day extension. Request Nos.
 19 26 through 31 seek documents sufficient to show the total sales, profits, wholesale prices, retail
 20 prices, and suggested retail prices in California and nationwide for the products that remain at
 21 issue in the case, during the 4-year Class Period. Miller Decl., ¶ 8. Request Nos. 70 and 71 seek
 22 total sales and retail prices of the products at each chain retailer in California and nationwide. *Id.*
 23 at ¶ 8. And Request No. 73 seeks a price comparison between BBUSA's products and similar
 24 products offered by competitors. *Id.* at ¶ 8. Despite BBUSA's diligence, it is unable to meet the
 25 May 28th deadline. With respect to sales, profits and wholesale pricing, the information does not
 26 exist in BBUSA's possession in any native format that would provide the information that the
 27 plaintiffs seek. Declaration of Gregory Moreno ("Moreno Decl."), ¶ 5. Nevertheless, in an effort
 28 to comply with the Order, BBUSA has attempted to generate reports that are responsive to these

1 requests. For example, to address the requests for wholesale pricing and sales in California,
 2 BBUSA has been through two iterations of its search in order to provide responsive information.
 3 *Id.* at ¶¶ 5-7. Still, BBUSA must analyze the reports, consult the various brands, and tailor the
 4 reports to ensure that they cover all products at issue in the case. *Id.* at ¶ 7. This is no simple
 5 task, and it will require a substantial amount of time, if only because the Second Amended
 6 Complaint is vague in its description of several of the products. *Id.* at ¶ 7.

7 Furthermore, BBUSA does not possess any documents that would reflect actual or
 8 suggested retail pricing. *Id.* at ¶ 8. However, BBUSA has initiated the process of obtaining
 9 responsive information, to the extent it exists, from a third-party vendor. *Id.* at ¶ 8. In an attempt
 10 to provide information related to the entire Class Period, the vendor will need to run custom
 11 reports that may show some of the information the plaintiffs have requested, but that information
 12 will likely need to be further tailored to be responsive and understandable. *Id.* at ¶ 9. Although
 13 BBUSA cannot control when it will receive the reports from its vendor, BBUSA anticipates that
 14 it will take at least 14 days, to the extent such reports are available. Accordingly, BBUSA
 15 respectfully requests a 21-day extension to June 18, 2014, for the production of sales and pricing
 16 information in response to Request Nos. 26 through 31, 70, 71, and 73.

17 V. CONCLUSION

18 For the foregoing reasons, BBUSA submits that the Court should sustain this Objection on
 19 the grounds that the May 28, 2014 deadline imposed by the Order is clearly erroneous, and grant
 20 the following relief from the Order:

- 21 1. The May 28, 2014 deadline to comply with Parts 1 and 3 of the Order – regarding
 22 “Pre-Class Period Discovery” and “Products Not Sold In California,” respectively – is
 23 extended to August 28, 2014; and
- 24 2. The May 28, 2014 deadline to comply with Part 2 of the Order – regarding “Financial
 25 Information” is extended to June 18, 2014.

1 Dated: May 28, 2014

HOGAN LOVELLS US LLP

2
3 By: /S/ Ethan A. Miller

4 ETHAN A. MILLER

5 Attorneys for Defendant
6 BIMBO BAKERIES USA, INC.
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DECLARATION OF ETHAN A. MILLER

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2 1. I, Ethan A. Miller, am an attorney duly licensed to practice in all of the courts in
3 the State of California and am a partner of Hogan Lovells US LLP, counsel of record for Bimbo
4 Bakeries USA, Inc., the defendant in this matter. The matters set forth herein are based on my
5 own personal knowledge and, if called as a witness, I could and would testify competently to the
6 truth of those matters.

7 2. On January 24, 2014, the plaintiffs in this matter served BBUSA with a set of
8 interrogatories and a set of document requests (the "Requests").

9 3. BBUSA served its original objections and responses to the Requests on March 7,
10 2014.

11 4. Shortly after BBUSA served its responses, the plaintiffs initiated a meet and confer
12 concerning BBUSA's objections, which became the subject of motion practice before the
13 Magistrate assigned to this case for discovery purposes.

14 5. Throughout the meet and confer process, as well as the briefs and oral arguments
15 before the Magistrate, the parties were focused on the discoverability of the information at issue.

16 6. The parties never proposed a timeline for the production of documents in the event
17 that the Magistrate ruled in the plaintiffs' favor on BBUSA's objections.

18 7. The May 28, 2014 deadline imposed by the Magistrate's Order, which was just
19 issued on May 14, 2014, is unworkable for several reasons.

20 8. Most of the Requests that are subject to the Order require e-discovery before
21 BBUSA can provide a complete response. Plaintiffs broadly seek, for example, "all documents
22 relating to the labeling or packaging" of the products at issue (RFP No. 1), "all documents
23 relating to food labeling requirements" that relate to the products at issue (RFP No. 5), and "all
24 documents relating to the difference in pricing" between the products at issue and competing
25 products (RFP No. 73). Other requests subject to the Order seek documents sufficient to show
26 the total sales, profits, wholesale prices, retail prices, and suggested retail prices in California and
27 nationwide for the products that remain at issue in the case, during the 4-year Class Period (RFP

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1 Nos. 26-31), and total sales and retail prices of the products at each chain retailer in California
 2 and nationwide (RFP Nos. 70 & 71).

3 9. The subject of e-discovery was first raised proactively by me during the meet and
 4 confer process approximately one month ago, during which I offered to draft an e-discovery
 5 protocol and proposed search terms. It was understood all along that the parties would meet and
 6 confer about the protocol and search terms in an effort to reach an agreement. However, it made
 7 no sense to do so while the parties were still meeting and conferring about the discoverability of
 8 the information and subsequently seeking relief from the Magistrate. Furthermore, since the time
 9 that BBUSA first broached the topic of e-discovery, the plaintiffs have expressed little or no
 10 urgency regarding obtaining the electronic data.

11 10. Now that the Magistrate has ruled on the discoverability of the information sought
 12 in the Requests, it makes sense for the parties to come to an agreement on the e-discovery
 13 protocol and search terms. At my direction, BBUSA is drafting a protocol and intends to provide
 14 it to the plaintiffs next week. The protocol will identify, among other things, the specific
 15 parameters for searching key words in various files, likely including from computers of various
 16 custodians. BBUSA is still in the process of identifying which employees' computers and
 17 potentially what company servers (and back-up tapes) must be searched.

18 11. After the parties finalize the e-discovery protocol, BBUSA will likely need to
 19 engage a vendor to apply the agreement and search terms to BBUSA's electronic systems. That
 20 process typically entails some subsequent quality control measures on the part of the vendor to,
 21 for instance, reduce search results for duplication (a "de-dupe" process) and otherwise ensure the
 22 accuracy of the results. Given the fact that an 8-year period is at issue, and BBUSA has identified
 23 over one dozen custodians and a number of companywide data sources that are likely to contain
 24 responsive information, the data gathering process is likely to take a substantial amount of time.
 25 In my experience in many matters involving similar e-discovery issues, it is not unusual for this
 26 process to take between 6 and 8 weeks.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/S/ Ethan A. Miller
Ethan A. Miller

DECLARATION OF GREGORY MORENO

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2 1. I, Gregory Moreno, am the Director of Marketing for Buns and Rolls at Bimbo
3 Bakeries USA, Inc. ("BBUSA"), the defendant in this matter. I know the matters set forth herein
4 to be true based on my own personal knowledge and, if called as a witness, I could and would
5 testify competently to the truth of those matters.

6 2. In connection with BBUSA's responses to the plaintiffs' First Set of Requests for
7 Production of Documents (the "Requests") propounded on BBUSA in this matter, I have been
8 asked to gather documents sufficient to show the sales and pricing information requested in
9 Request Nos. 26, 27, 28, 29, 30, 31, 70, 71, and 73.

10 3. Over the past three weeks, I have had several discussions with in-house and
11 outside counsel regarding whether such responsive information exists, and if so, how the
12 information can be gathered most efficiently and comprehensively. My findings are as follows.

13 4. To the extent that the Requests seek information related to sales, profits, and
14 wholesale pricing, such information is accessible only in part to BBUSA, and does not exist in
15 any native format that would provide the information that the plaintiffs seek.

16 5. For example, Request Nos. 26, 28, and 70 seek sales and pricing data for sales in
17 California specifically. To address those Requests, I attempted to run reports to isolate total sales
18 in California for the products that remain at issue in the case over the 4-year Class Period. I
19 discovered that any such report would reflect sales to any entity that lists a California corporate
20 address in BBUSA's system. Therefore, the report would reflect, among other things, sales made
21 outside California to California-based retailers. Based on my reading of the Requests, as well as
22 my communications with counsel, it is my understanding that sales made outside California are
23 not within the scope of Request Nos. 26, 28, and 70.

24 6. To respond to Request Nos. 26, 28, and 70 more accurately, I have attempted to
25 run a report to reflect sales in each sales "route" in California in which BBUSA delivers its
26 products. Such a report should reflect only the sales actually made in California.

27 7. However, because the description of the products in the Second Amended
28 Complaint lacks precision, I need to consult with personnel at the various brands, as well as

1 outside counsel, to determine which products in the report coincide with the products at issue in
 2 this matter. Given the number of products at issue and the volume of the sales and pricing data
 3 generated in my reports, I anticipate that this review will take a substantial amount of time.

4 8. Furthermore, with respect to Request Nos. 30, 31, 70, 71, and 73, which seek
 5 actual and suggested retail pricing, BBUSA does not possess any documents that would reflect
 6 such information. However, in an effort to comply with the discovery that has been ordered in
 7 this matter, I have been asked to attempt to obtain responsive information from a third-party
 8 vendor that may track such information and may make it available to BBUSA.

9 9. The information sought in Request Nos. 30, 31, 70, 71, and 73 would not be
 10 reflected in any of the standard reports offered by the third-party vendor. In addition, the
 11 vendor's standard reports may not reflect information prior to 2011. However, at BBUSA's
 12 request, the vendor may be able to run custom reports that may show some of the information
 13 requested by the plaintiffs, for the 4-year Class Period, but that information will likely need to be
 14 further tailored to be responsive to the Requests. It is my understanding that it will take at least
 15 14 days to generate these reports in a form that is suitable for production.

16 I declare under penalty of perjury under the laws of the State of California that the
 17 foregoing is true and correct.

18 Executed this 28th day of May 2014 at Villas, New Jersey.

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 20 
 21 GREGORY L. MORENO